FAR-FETCHED USES OF DRUG DETECTION DOG ALERTS: A CASE NOTE ON *UNITED STATES V. BRADDY*

Daniel Kaseff[†]

TABLE OF CONTENTS

[†]Articles Editor, *Cardozo Law Review*, J.D. Candidate (June 2023), Benjamin N. Cardozo School of Law; B.A., The George Washington University (2018). I would like to thank Professor Ngozi Okidegbe for her helpful guidance and advice during the process of writing this Note. I would also like to thank the editors of *Cardozo Law Review* for their hard work in preparing this Note for publication, as well as my friends and family, including my dog, Zoey, for their support.

INTRODUCTION

A man is pulled over by a police officer, and upon reasonable suspicion, the officer runs a drug detection dog around the man's car. This dog has been trained to give a specific alert when detecting the presence of drugs. Instead of providing the specific final alert, a scratch at the car door, the dog merely changes its breathing pattern and looks curiously for a second at a spot on the car. The officer is confident in his ability to interpret what the dog is trying to convey and considers this to be sufficient for an alert. Since a drug detection dog alert can provide probable cause, the officer is now free to search the car, and indeed discovers large quantities of drugs. Or perhaps the officer does not find anything at all, and his subjective interpretations of the dog's behavior were misplaced. Maybe the officer's interpretations were wrong, but the search still yields a finding of drugs, which eventually results in the driver's conviction for possession and intent to distribute.[1]

This is the kind of scenario that is possible in the Eleventh Circuit Court of Appeals, where officers can use drug detection dogs to skirt around the requirements of probable cause and conduct a search without a proper basis.[2] Probable cause requires an objective basis,[3] and drug detection dogs are often used to provide such a basis by giving an alert.[4] However, in the Eleventh Circuit, this requirement of objectivity is

---

1 This is a hypothetical scenario designed to demonstrate a potential real-life application of the holding in *United States v. Braddy*, 11 F.4th 1298, 1315 (11th Cir. 2021) ("We therefore conclude that the district court did not err in finding that the drug detection dogs' alerts were sufficiently reliable to provide probable cause for the officers to search Braddy's vehicle and affirm as to this issue.").

2 *See id.* at 14–15.

3 *See* District of Columbia v. Wesby, 138 S. Ct. 577, 584 n.2 (2018) ("[P]robable cause is an objective standard.").

4 JOHN J. ENSMINGER, POLICE AND MILITARY DOGS: CRIMINAL DETECTION, FORENSIC EVIDENCE, AND JUDICIAL ADMISSIBILITY 7–8 (2012).

arguably considered more a formality, with the dog's alert being treated as sufficient on the basis of the officer's subjective interpretations alone.[5]

In *United States v. Braddy*, police officers searched a man's car and discovered cocaine, after determining that they had probable cause based on the behavior of their drug detection dogs.[6] The drug detection dogs did not reach their trained final alerts, though they did display behavior that the officers recognized as indicative of the presence of drugs.[7] The Eleventh Circuit rejected Braddy's argument that the weak and unfinished dog alerts were not sufficiently reliable for establishing probable cause.[8]

This case presents a split with other circuit courts, and differs in its holdings from some courts that require a showing of more objective evidence than the kind of subjective evidence interpreted by the officers as sufficient for probable cause.[9] The Fifth Circuit Court of Appeals, for example, requires that the dog's alert be more than simple "casting," which the court defines as something that falls short of a strong alert but is enough to temporarily grab the dog's attention.[10] Likewise, some district courts agree that an officer's subjective interpretations alone cannot be the basis for establishing probable cause.[11]

This Case Note will argue that the Eleventh Circuit was wrong in affirming the opinion of the district court that a weak dog alert is sufficient for establishing probable cause.[12] Though probable cause does not necessarily require that a dog reach a specific final alert,[13] the behavior of the dog indicating the presence of drugs must be based in objectivity, and not based on the kind of subjective interpretations made by the police officers in *Braddy*.[14] This objective analysis should not be a rigid and defined test, but rather should look to the totality of the circumstances, as

---

5 *Braddy*, 11 F.4th at 1313 (giving weight to the officers' explanations based on their history and experience with these dogs).

6 *Id.* at 1302.

7 *Id.* at 1304.

8 *Id.* at 1312–15.

9 *See generally* United States v. Rivas, 157 F.3d 364 (5th Cir. 1998); United States v. Heir, 107 F. Supp. 2d 1088 (D. Neb. 2000); United States v. Wilson, 995 F. Supp. 2d 455 (W.D.N.C. 2014).

10 *Rivas*, 157 F.3d at 368 ("[T]he dog maybe feels not a strong alert, but something that temporarily stops him and deters his attention at that point. And although he doesn't pursue as aggressive alert, he does stop and give it minute attention and continues with his duties by continuing his examination.").

11 *See generally Heir*, 107 F. Supp. 2d 1088; *Wilson*, 995 F. Supp. 2d 455.

12 *See infra* Part IV.

13 *See infra* Section IV.B.

14 United States v. Braddy, 11 F.4th 1298, 1313 (11th Cir. 2021) (describing how Officer Sullivan's interpretation of his dog's response was based on his history of working with this dog).

described in previous cases from the Supreme Court and the Eleventh Circuit.[15]

Part I of this Case Note begins with an overview of the relevant background and precedent.[16] This will involve an exploration of how the Fourth Amendment provides the foundation for probable cause in the United States,[17] followed by an explanation of the requirement of objectivity in establishing probable cause,[18] as well as the relevant behaviors and qualities of drug detection dogs in probable cause analysis.[19] Part II will examine the facts and procedural history of *Braddy*,[20] which provides a situation where drug detection dogs were used by police officers to find probable cause and conduct a search.[21] Part III will examine the opinions of both the majority and the dissent in *Braddy*, discussing the points on which they agree and diverge.[22] Part IV will then evaluate the arguments made in the majority's holding on sufficient drug detection dog alerts.[23] Finally, Part V will provide a proposal on how to consider weak drug detection dog alerts for purposes of establishing probable cause.[24]

I. BACKGROUND AND PRECEDENT

A. *The Fourth Amendment and Probable Cause*

Probable cause is required in order to conduct searches and seizures that would otherwise be considered unreasonable.[25] This requirement is included among certain rights under the Fourth Amendment to the United States Constitution, which specifies:

---

15 *See* Florida v. Harris, 568 U.S. 237 (2013); United States v. Gonzalez, 969 F.2d 999 (11th Cir. 1992).

16 *See infra* Part I.

17 *See infra* Section I.A.

18 *See infra* Section I.B.

19 *See infra* Section I.C.

20 *See infra* Part II.

21 United States v. Braddy, 11 F.4th 1298 (11th Cir. 2021).

22 *See infra* Part III.

23 *See infra* Part IV.

24 *See infra* Part V.

25 U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[26]

The Supreme Court views probable cause as a critical part of cases concerning the Fourth Amendment and suggests that it is a balance between the necessities of safeguards for privacy and flexibility for law enforcement.[27] Such a balance is needed to ensure that citizens are protected from unreasonable intrusions, while also providing for reasonable means of protecting the community.[28] Whether a particular situation calls for a search, according to this balancing act, depends on the context of the event and whether the police officer has a high enough degree of suspicion of criminal activity.[29]

Under Supreme Court precedent, a police officer has probable cause to search a vehicle when the facts available would make a reasonable person believe that contraband or evidence of a crime is present.[30] However, such determinations of whether there is probable cause cannot be condensed into exact odds or percentages.[31] Thus, when evaluating probable cause, courts should reject bright-line rules and look to the totality of the circumstances.[32]

---

26 *Id.*

27 *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 1, INVESTIGATION 117 (6th ed. 2013); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection.").

28 DRESSLER & MICHAELS, *supra* note 27, at 117.

29 *See* Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1514 (2010) ("[T]he more certain an officer is that a desired investigative step will turn up evidence of a crime, the more weight we give to his or her request to access private information, and the more privacy we allow his or her request to outweigh.").

30 Texas v. Brown, 460 U.S. 730, 742 (1983) ("[P]robable cause . . . . merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband or stolen property or useful as evidence of a crime . . . ." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

31 Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.").

32 *See id.*; Florida v. Harris, 568 U.S. 237, 244 (2013) ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

B. *Requirements in Objectivity*

The Supreme Court has found that "probable cause is an objective standard"[33] and is considered from the view of an objectively reasonable police officer.[34] Indeed, officers must point to objective factors, those being specific facts capable of being expressed by the officer,[35] and cannot simply base intrusions on the use of vague feelings that are incapable of being put into words.[36] Thus, the protections of the Fourth Amendment are meaningful only when the reasonableness of the conduct of the officers can be scrutinized within the particular circumstances of the case.[37] This requirement of objectivity applies in probable cause cases, as well as in cases involving reasonable suspicion, a standard which demands a lower level of suspicion than probable cause.[38]

When considering probable cause analysis, it is important to note that the officers' subjective interpretations or intentions are not factors for consideration.[39] As such, a court will look no further if probable cause objectively exists for the purposes of conducting a search.[40] If a court does not know why the officers acted, it cannot accurately decide questions of probable cause because it cannot determine whether the officers were

---

33 District of Columbia v. Wesby, 138 S. Ct. 577, 584 n.2 (2018).

34 Ornelas v. United States, 517 U.S. 690, 696 (1996) ("The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.").

35 Terry v. Ohio, 392 U.S. 1, 21 (1968) ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

36 *Id.* at 22 ("Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.").

37 *Id.* at 21–22 (demanding, for Fourth Amendment purposes, that "the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances").

38 DRESSLER & MICHAELS, *supra* note 27, at 138 (detailing that the Supreme Court has held that searches and seizures may be conducted based on reasonable suspicion, which is a "lesser quantum of evidence than 'probable cause'"); *see also* Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause . . . .").

39 Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

40 DRESSLER & MICHAELS, *supra* note 27, at 122 ("It is of no Fourth Amendment consequence that the officer may subjectively have had an ulterior motive—even, for example, a racially or religiously biased reason—for his actions.").

objectively justified in their conduct.[41] Good faith on the part of the officers is not enough, as that would precariously leave the protections of the Fourth Amendment entirely within the discretion of the police.[42] Overall, fair enforcement of the law depends upon the use of objective standards in the conduct of the officer, rather than subjective standards depending on the officer's mindset.[43]

This view of objectivity and probable cause from the Supreme Court is fully applicable in the Eleventh Circuit Court of Appeals, which has agreed in past cases that probable cause determinations must be decided based on the objective facts available to the officers at the time of the search.[44] Furthermore, the Eleventh Circuit recognizes that the subjective beliefs of the officers are not relevant when determining the existence of probable cause.[45]

C. *The Constitutionality of Drug Detection Dogs*

1. Drug Detection Dogs, Training, and Alerts

Before exploring Supreme Court precedent on the use of drug detection dogs, it is important to provide some background on how they are trained and utilized. The process of training a drug detection dog can be expensive and laborious, with national police dog organizations providing training standards.[46] In contrast to older forms of training, many training techniques today focus more on the use of positive stimuli, with the officers rewarding the dogs with praise following the completion

---

41 *See* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("[T]he Fourth Amendment requires at least a minimal level of objective justification for making the stop.").

42 Beck v. Ohio, 379 U.S. 89, 97 (1964) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." (quoting U.S. CONST. amend. IV)).

43 Horton v. California, 496 U.S. 128, 138 (1990) ("First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.").

44 United States v. Gonzalez, 969 F.2d 999, 1003 n.6 (11th Cir. 1992) ("[T]he court must decide whether the objective facts available to the officers *at the time of arrest* were sufficient to justify a reasonable belief that an offense was being committed.").

45 Rankin v. Evans, 133 F.3d 1425, 1433 (11th Cir. 1998) ("[T]his Circuit explicitly rejected the idea that the subjective belief of the arresting officer is relevant to the determination of whether probable cause exists.").

46 ENSMINGER, *supra* note 4, at 6–7 (noting that such positive techniques today have replaced more aversive training techniques, and that training for dogs is "serious business").

of a successful task.[47] An important aspect of training for police dogs is that the dogs can understand and work well with their handlers as part of a team.[48]

Most drug detection dogs work by providing an alert, in which the dog exhibits a specific pattern of behavior, letting the officer know about the existence of a particular odor of interest.[49] Alerts can be active or passive, though narcotics dog handlers typically prefer more aggressive alerts.[50] A dog trained to provide an aggressive alert tends to growl or paw at the target, while a dog trained to provide a passive alert sits or lies down in the presence of the target.[51] Typically, courts treat a handler's determination that its dog alerted with great deference, and thus courts will rarely question such determinations.[52]

2. Sufficient Alerts in the Supreme Court and the Eleventh Circuit

Turning to the relevant Supreme Court precedent, a drug detection dog's alert can provide probable cause to conduct a search if the dog is reliable for that purpose.[53] In analyzing a drug detection dog's reliability, a dog's certification or training is sufficient for providing trust in its alert.[54] However, the Supreme Court has rejected a "strict evidentiary

---

47 *Id.* at 7 ("Aversive training techniques preferred by many handlers 20 years ago have increasingly been replaced by techniques involving positive stimuli, such as treats, toys, and praise. This remains a matter of debate among trainers of police and military dogs as well as generally in the canine training industry.").

48 *Id.* ("In analyzing the functions of police dogs, it must never be forgotten that the dogs and their handlers are teams, and their ability to work together depends on their ability to understand each other.").

49 *Id.* ("Most police dog functions involve an *alert*, a specific and simple behavior pattern by which the dog indicates to the handler that a target odor is present.").

50 *Id.* at 7–8 ("An aggressive alert, where the dog paws or bites the item from which the odor is emanating, is often preferred by narcotics dog handlers but can be dangerous where a dog is detecting hidden explosives or landmines.").

51 *Id.*

52 Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 764–65 (2007) ("The current doctrine allows the police to circumvent the need for probable cause by placing unquestioned reliance on the handler's testimony that a drug dog alerted.").

53 *See* Florida v. Harris, 568 U.S. 237, 246–48 (2013).

54 *Id.* at 246–47 ("If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.").

checklist"[55] approach for evaluating such reliability, instead emphasizing the fluid, messy, and undefined nature of probable cause.[56]

Since 1983, the Supreme Court has held that subjecting luggage to a sniff test by a trained drug detection dog is not considered a "search" under the Fourth Amendment.[57] This exemption, from the case *United States v. Place*, is based on the argument that a drug detection dog sniff is limited in nature and only discloses the existence of contraband.[58] Therefore, the dog sniff is *sui generis*, meaning it is a unique form of investigation, given the inherent limitation on information that can be obtained by the dog.[59] It likewise does not constitute a "search" to use drug detection dog sniffs on stopped vehicles, as the Supreme Court later elaborated in *Illinois v. Caballes*.[60]

The Eleventh Circuit Court of Appeals largely follows this precedent, finding that probable cause arises when a drug detection dog provides an alert.[61] In turn, a dog alert that provides probable cause gives rise to a search of the vehicle.[62] However, these holdings are based on cases where the issue concerns the relationship of probable cause and drug detection dog alerts in general, while the alert of the dog itself is unquestioned.[63] This is in sharp contrast to the issue in *Braddy*, where the

---

55 *Id.* at 244.

56 Illinois v. Gates, 462 U.S. 213, 232 (1983) ("As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

57 Katz & Golembiewski, *supra* note 52, at 736–37 ("The Court stated that the dog sniff of a piece of luggage is not a search subject to the Fourth Amendment because a dog sniff is a limited intrusion capable only of accurately determining whether or not the luggage contains contraband.").

58 United States v. Place, 462 U.S. 696, 707 (1983) ("Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.").

59 Jeffrey S. Weiner & Kimberly Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs!*, 30 CHAMPION 12, 12–13 (2006); DRESSLER & MICHAELS, *supra* note 27, at 94 ("The Court in *Place* observed that 'the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.'" (quoting *Place*, 462 U.S. at 707)).

60 Illinois v. Caballes, 543 U.S. 405 (2005); DRESSLER & MICHAELS, *supra* note 27, at 93 ("In *Illinois v. Caballes*, the Supreme Court again upheld as a 'non-search' the use of a narcotic-trained dog—this time to walk around an automobile lawfully stopped on the highway for speeding—to sniff for drugs." (footnote omitted)).

61 United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993) ("Our circuit has recognized that probable cause arises when a drug-trained canine alerts to drugs.").

62 Hearn v. Bd. of Pub. Educ., 191 F.3d 1329, 1333 (11th Cir. 1999) ("When the property alerted to is in a vehicle, the Constitution permits a search of the vehicle immediately, without resort to a warrant.").

63 *See Banks*, 3 F.3d at 402; *Hearn*, 191 F.3d 1329.

issue is not whether an alert can provide probable cause, but whether the dog provided a sufficient alert for that purpose.[64]

3. Differing Views on Sufficient Alert Behavior

In other circuit courts, such as the Fifth Circuit, a drug detection dog's "casting" alone has been found to be too distantly related to an alert to create reasonable suspicion (and thus probable cause) "as a matter of law."[65] That is, a mere change in behavior by the dog is insufficient to qualify as an alert.[66] According to the Fifth Circuit, a drug detection dog is required to perform the indications that it has been trained to do before its behavior constitutes an alert that provides probable cause.[67]

Similarly, in the Sixth Circuit, an officer's awareness of a dog's interest in closed items may be considered by the court when determining whether the totality of circumstances establishes probable cause, but a dog's interest alone does not constitute probable cause.[68] Comparable findings are present in decisions from the Eighth Circuit and the Tenth Circuit as well, where interest is not treated the same as an alert, and such interest alone is insufficient to establish probable cause.[69]

Circuit courts have also recognized that drug detection dog alerts can come in multiple forms, noting that such alerts are specifically trained behavior, including either aggressive or passive conduct.[70] While these courts agree that a drug detection dog's alert to the presence of contraband is sufficient to provide probable cause, some have found that

---

64 United States v. Braddy, 11 F.4th 1298, 1315 (11th Cir. 2021).

65 United States v. Rivas, 157 F.3d 364, 368 (5th Cir. 1998) (describing casting and alerts and noting that "the difference between an alert and a cast is the difference between scratching and biting at an object, and temporarily stopping, giving part of the object 'minute attention' and continuing with the inspection").

66 *Id.*

67 *Id.* ("[N]o federal court has ever confronted a situation where a dog's cast is used to justify a search, nor a situation where a 'weak alert' on its own triggers a search. The government bears the ultimate burden of proof when it searches without a warrant.").

68 United States v. Guzman, 75 F.3d 1090, 1096 (6th Cir. 1996) ("[W]e acknowledge that the dog's 'interest' in the bag alone would not constitute probable cause . . . .").

69 United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993) (describing how the dog showed an interest but had not given a full alert to a package, and holding that "such an application, on its face, would not support probable cause"); United States v. Muñoz-Nava, 524 F.3d 1137, 1145 (10th Cir. 2008) ("The district court determined that, absent a full alert, the dog's behavior was not sufficient to support probable cause, but the behavior change could be considered in the totality of the circumstances. We agree. A behavior change alone would not constitute probable cause." (footnote omitted)).

70 *See, e.g.*, United States v. Johnson, 323 F.3d 566, 567 (7th Cir. 2003).

a dog is not required to give a final indication before probable cause is established.[71] For example, the Tenth Circuit has held that a drug detection dog does not need to give a final response in order to be sufficiently reliable.[72] The Ninth Circuit largely agrees, finding that whether a particular dog displays enough signaling behavior can depend on the individual circumstances of the case.[73]

In other district courts, probable cause cannot be based on the subjective interpretations of officers, which are in turn dependent on the ambiguous behavior of the dogs.[74] These courts have noted their concerns that such subjectivity in a probable cause analysis would be unacceptable under the Fourth Amendment.[75] Accepting such subjective interpretations for probable cause would, in effect, serve to make such search decisions by officers unreviewable.[76]

Notably, precedent from the Supreme Court and the Eleventh Circuit is binding on the decision in *United States v. Braddy*, while cases from other circuit courts and district courts have persuasive authority, which may still be helpful in evaluating this case. In particular, the most helpful comparisons in dog behavior can be seen in the Ninth and Tenth Circuits,[77] while clear contrasts in how these behaviors are legally considered can best be demonstrated by the Fifth Circuit.[78] The views of probable cause and sufficiency of drug detection dog alerts from these cases are directly relevant to the issue in this Case Note.[79]

Braddy presents a circuit split regarding probable cause in this context, which provides an opportunity to explore the legal differences in this area and to state the applicable law in light of these contrary

---

71 *See* United States v. Parada, 577 F.3d 1275 (10th Cir. 2009); United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013).

72 *Parada*, 577 F.3d at 1282 ("We decline to adopt the stricter rule urged by Mr. Parada, which would require the dog to give a final indication before probable cause is established.").

73 *Thomas*, 726 F.3d at 1098 (noting its agreement with the holding in *Parada* in stating that "[i]ts rationale was on the mark: probable cause is measured in reasonable expectations, not certainties").

74 United States v. Heir, 107 F. Supp. 2d 1088, 1097 (D. Neb. 2000) (disagreeing with the government's argument on the elevation of "the officer's subjective interpretations of a dog's ambiguous behavior—which itself may be noticeable only to the handler—to the level of 'facts' sufficient to amount to probable cause").

75 United States v. Wilson, 995 F. Supp. 2d 455, 475 (W.D.N.C. 2014).

76 *Id.* ("A court cannot accept a handler's subjective determination that a dog has made some otherwise undetectable alert, which conclusion would be, for all practical purposes, immune from review.").

77 *See Parada*, 577 F.3d 1275; *Thomas*, 726 F.3d 1086.

78 *See* United States v. Rivas, 157 F.3d 364, 368 (5th Cir. 1998).

79 *See infra* Part IV.

holdings.[80] While *Braddy* takes an approach that permits a more subjective interpretation of drug detection dog alerts,[81] other courts have taken the view that an alert must be more rooted in objectivity for the purposes of establishing probable cause.[82]

II. FACTS AND PROCEDURAL HISTORY

A. *Facts*

On September 27, 2018, Officer Austin Sullivan pulled over James Braddy in Saraland, Alabama, in response to Braddy's bicycles obstructing his license tag, and to what Officer Sullivan perceived as Braddy's suspicious reaction to the patrol car.[83] Based on Braddy's behavior during the stop, Officer Sullivan believed that he had reasonable suspicion of criminal activity.[84] Braddy denied consent for a search of his vehicle.[85]

Additional officers arrived, including Lieutenant Gregory Cully and Officer Dan Taylor, and Officer Sullivan asked Lieutenant Cully to run his drug detection dog, Chico, around Braddy's vehicle.[86] Officer Sullivan had previously trained with Lieutenant Cully and was familiar with how Chico would act when detecting drugs.[87]

Officer Sullivan said he observed Chico go into "odor response" while passing the driver's side door.[88] Officer Sullivan also described the video of this response as showing Chico "change[] its mouth and body posture, stop[] wagging and straighten[] its tail, turn[] its body to be 'squared up with the car,' and began lifting [its] paw before Lieutenant

---

80 United States v. Braddy, 11 F.4th 1298, 1316 (11th Cir. 2021) (Rosenbaum, J., concurring in part and dissenting in part) ("Other courts, wary of this possibility, have not allowed officers to rely on ambiguous dog behavior to justify a search.").

81 *Id.* at 1315 (majority opinion).

82 *See Rivas*, 157 F.3d 364; United States v. Heir, 107 F. Supp. 2d 1088 (D. Neb. 2000); United States v. Wilson, 995 F. Supp. 2d 455 (W.D.N.C. 2014).

83 *Braddy*, 11 F.4th at 1302–04.

84 *Id.* at 1303 ("Officer Sullivan could tell Braddy was 'extremely nervous,' as Braddy did not make eye contact and stated that his brother was a police officer."); *id.* at 1304 ("Although Officer Sullivan told Braddy early into the stop that he was only going to give him a warning, Braddy continued to act nervous, failed to make eye contact, and tried to distance himself from the officers.").

85 *Id.* at 1305.

86 *Id.* at 1303–04; Brief of the Appellant James Bernard Braddy at 7, *Braddy*, 11 F.4th 1298 (No. 19-12823) [hereinafter Brief of Appellant] (identifying Officer Cully's dog's name as "Chico").

87 *Braddy*, 11 F.4th at 1304.

88 *Id.*

Cully tripped over [Chico]."[89] Officer Sullivan viewed this behavior as a sufficient alert, though Chico was trained to give a paw scratch as a "final response."[90] Lieutenant Cully later stated that he saw Chico's alert but did not tell the other officers at the time.[91]

Officer Sullivan then ran his own drug detection dog, Leroy, around the vehicle, and said that Leroy also indicated a drug odor from the driver's side door by leaning its body forward, closing its mouth, changing its breathing and body posture, and straightening out its tail.[92] Officer Sullivan described this behavior as "very quick."[93] However, Leroy did not go into its trained "final response," which concluded with an "aggressive alert."[94] Officer Sullivan said that Leroy did not give a final alert because it was unable to pinpoint the source of drugs due to wind and a sealed compartment in the vehicle.[95]

Officer Sullivan was trained to handle drug detection dogs, and he and Leroy had a National Police Canine Association certification.[96] Lieutenant Cully was also trained and certified with Chico, but said that he had missed seeing Chico alert a few times.[97] Lieutenant Cully, upon viewing the video of the stop, agreed with Officer Sullivan that Chico had alerted to the presence of a drug odor.[98] Following the sentencing at trial, the United States Attorney's Office for the Southern District of Alabama similarly characterized the behavior of the dogs as positively indicating a drug odor.[99]

Braddy's expert witness, Andre Jimenez, opined that the two officers made numerous errors with the dogs, including "overhandling" them

---

89 *Id.* at 1305.

90 *Id.* at 1313.

91 *Id.* at 1305 ("Lieutenant Cully explained on re-direct that he did not mention his dog's positive response because he did not want to influence another handler—Officer Sullivan—who was about to search the vehicle.").

92 *Id.* at 1304; Brief of Appellant, *supra* note 86, at 7–8 (identifying Officer Sullivan's dog's name as "Leroy").

93 *Braddy*, 11 F.4th at 1313.

94 *Id.* at 1305.

95 *Id.* at 1304.

96 *Id.* at 1305.

97 *Id.*

98 *Id.* at 1313 ("Lieutenant Cully explained that he viewed the video evidence of the traffic stop and observed his drug detection dog on video perform all those behavioral changes up until the point of the dog beginning to raise his paw.").

99 Press Release, U.S. Atty's Off., S.D. Ala., Miami Drug Trafficker Sentenced to More Than Ten Years for Cocaine Conspiracy (July 16, 2019), https://www.justice.gov/usao-sdal/pr/miami-drug-trafficker-sentenced-more-ten-years-cocaine-conspiracy [https://perma.cc/A8M6-Q67D] ("During the stop, a police dog gave a positive indication for the odor of a controlled substance emanating from Braddy's vehicle.").

with chain jerks, and distracting and confusing them with extra commands.[100] Jimenez also said that the dogs' behavior was not a valid indicator for smelling a drug odor.[101] However, the district court credited the testimony of the officers over the testimony of Jimenez, noting that some other courts had found Jimenez to be not credible.[102]

Following the use of the drug detection dogs, the officers searched Braddy's vehicle and discovered sixty-two kilograms of cocaine, as well as a bag containing roughly $40,000 in cash.[103] Officers estimated the overall street value of the packages of cocaine to be approximately $4,100,000.[104] In an interview following the arrest, a detective stated, "[t]hese officers are trained on what to look for and how to make stops and what questions to ask that basically lead to probable cause and getting the dog involved to get the drugs off the streets."[105]

B. *Procedural History*

1. United States District Court for the Southern District of Alabama

Braddy was indicted by a grand jury for possession with intent to distribute more than five kilograms of cocaine and conspiracy to possess with intent to distribute more than five kilograms of cocaine.[106] He filed a motion on November 19, 2018, to suppress the evidence seized by the police from the traffic stop.[107]

The district court held a two-day evidentiary hearing in December 2018 to consider the motion.[108] On January 29, 2019, the district court

---

100 *Braddy*, 11 F.4th at 1306.

101 *Id.* ("Jimenez also opined that the dogs' behaviors of wagging their tails or closing their mouths was not a valid indicator for smelling a narcotic order.").

102 *Id.* at 1307 ("The district court explained that the officers testified that the dogs were trained and certified and noted that Jimenez's testimony had previously been found not credible by four other courts.").

103 *Id.*

104 *Estimated Street Value of $4.1 Million of Cocaine Recovered in Saraland*, FOX10 NEWS (Sept. 27, 2018), https://www.fox10tv.com/news/estimated-street-value-of-4-1-million-of-cocaine-recovered-in-saraland/article_f7e51ece-c29c-11e8-b4a3-ab4b47b5272d.html [https://perma.cc/3GFE-Z68Y].

105 *Id.*

106 *Braddy*, 11 F.4th at 1302.

107 *Id.*

108 *Id.* at 1303.

denied Braddy's motion to suppress, rejecting his argument, and concluding that the officers had probable cause to search his vehicle.[109]

Braddy waived his right to a jury trial on February 1, 2019, admitting guilt but seeking to maintain his right to appeal the order that had denied the motion to suppress.[110] The district court granted Braddy's motion to waive his right to a jury trial and held a bench trial.[111] The court found the evidence sufficient to convict Braddy beyond a reasonable doubt on both counts and entered a written order finding him guilty on both of his charges.[112]

On July 10, 2019, Braddy was sentenced to 121 months' imprisonment.[113] A couple of weeks later, on July 24, 2019, Braddy filed a notice of appeal to the Eleventh Circuit Court of Appeals.[114]

2. United States Court of Appeals, Eleventh Circuit

In the appellant brief, Braddy's counsel argued that the drug detection dogs failed to sufficiently alert to the vehicle.[115] In contrast, the appellee brief from the United States Attorney claimed that the dogs did sufficiently alert for the purposes of providing probable cause.[116] Oral argument for the appellate case was held on December 15, 2020.[117]

On August 31, 2021, the Eleventh Circuit Court of Appeals affirmed the decision of the district court, agreeing with its denial of Braddy's motion to suppress.[118] Subsequent to this denial, Braddy's counsel petitioned for a rehearing en banc.[119] However, on December 10, 2021, the Eleventh Circuit denied his petition, both for a rehearing en banc and

---

109 *Id.* at 1306.

110 *Id.* at 1307.

111 *Id.*

112 *Id.*

113 *Id.*

114 Notice of Appeal, United States v. Braddy, No. 18-cr-00300-CG-MU, 2019 WL 3061559, (S.D. Ala. July 24, 2019).

115 Brief of Appellant, *supra* note 86, at 10 ("Additionally, the two drug dogs that performed dog sniffs did not have a positive alert justifying the search of Braddy's vehicle.").

116 Brief of Appellee United States at 42, *Braddy*, 11 F.4th 1298 (No. 19-12823) ("In sum, the canines alerted to Braddy's vehicle during a lawful traffic stop. . . . Once the canines alerted, the officers had probable cause to search the vehicle. This Court should affirm the district court's denial of Braddy's motion to suppress.").

117 Oral Argument, *Braddy*, 11 F.4th 1298 (No. 19-12823), http://www.ca11.uscourts.gov/content/19-12823 [https://perma.cc/G94F-NZLR].

118 *Braddy*, 11 F.4th at 1302.

119 United States v. Braddy, No. 19-12823-AA, 2021 U.S. App. LEXIS 36582, at *1 (11th Cir. Dec. 10, 2021) (per curiam).

for a rehearing before the panel.[120] Since that denial, no further action has been taken in this case.[121]

III. HOLDING AND DISSENT

A. *Holding*

This appellate opinion focused on three issues: (1) the lawfulness of the initial traffic stop; (2) law enforcement's unlawful prolonging of the traffic stop; and (3) probable cause to search the vehicle based on the dogs' alerts.[122] However, the only issue relevant to this Case Note is whether the use of drug detection dogs provided probable cause. On that issue, the Eleventh Circuit Court of Appeals held that the alerts of the drug detection dogs were sufficiently reliable to provide probable cause to search Braddy's car for drugs.[123] The court based its holding on the fact that the dogs and their handlers (the officers) were trained and certified, that the officers were familiar with the behavior of the dogs, and that the officers thought such behavior was sufficient.[124]

The majority cited precedent from the Supreme Court and the Eleventh Circuit, finding that a drug detection dog can provide probable cause through an alert.[125] It also demonstrated that a probable cause analysis should be based on the "totality of the circumstances,"[126] and that such an analysis does not need to follow a "strict evidentiary checklist."[127]

Additionally, the majority held that the district court's decision to credit the testimony of the officers over the testimony of Braddy's expert, Andre Jimenez, regarding the drug detection dog alerts was not clearly erroneous, finding that substantial deference should be given to the credibility determinations of the district court as the factfinder.[128] The court dismissed the argument that the ambiguous behavior of the dogs

120 *Id.*

121 *Id.*

122 *Braddy*, 11 F.4th at 1307–15.

123 *Id.* at 1315.

124 *Id.* at 1314–15.

125 *Id.* at 1312; s*ee* United States v. Banks, 3 F.3d 399 (11th Cir. 1993).

126 *Braddy*, 11 F.4th at 1312; *see* Florida v. Harris, 568 U.S. 237, 244 (2013).

127 *Braddy*, 11 F.4th at 1312; s*ee Harris*, 568 U.S. at 244.

128 *Braddy*, 11 F.4th at 1313 ("In the context of a motion to suppress, we review the district court's findings of fact for clear error, 'construe[ing] all facts in the light most favorable to the party that prevailed in the district court and afford[ing] substantial deference to a factfinder's credibility determinations.'" (alterations in original) (quoting United States v. Holt, 777 F.3d 1234, 1255 (11th Cir. 2021))).

was not captured by video evidence, finding that such evidence is not dispositive.[129]

The majority also held that a final alert is not required for a drug detection dog to be sufficiently reliable.[130] Citing cases from the Ninth and Tenth Circuits, the majority found that such a requirement would be too strict of a rule[131] and not in line with the Supreme Court's prescription of a more flexible approach for probable cause.[132]

B. *Dissent*

Dissenting in part—the part being the entirety of the issue discussed by this Case Note—Circuit Judge Rosenbaum agreed primarily with the view of the Fifth Circuit that a drug dog's "casting" is too distantly related to an alert to create probable cause, on its own, as a matter of law.[133] The parts in which Judge Rosenbaum concurred with the majority concerned the issues of the initial stop of Braddy and the lawfulness of the duration of the stop.[134]

The dissent found that the officers' observations failed to utilize specific and objective facts, which are required for probable cause findings.[135] Pointing to Supreme Court and Eleventh Circuit precedent, the dissent argued that such a lack of objective evidence is prohibited by the Fourth Amendment.[136] In contrast to the view of the district court,

---

129 *Id.* at 1313–14 ("However, whether the video evidence can or cannot confirm the dogs' behavior that the officers described is not dispositive to the issue."); *see* United States v. Parada, 577 F.3d 1275, 1281 (10th Cir. 2009).

130 *Braddy*, 11 F.4th at 1314–15.

131 *Id.* at 1314 ("Indeed, other circuits have similarly rejected a stricter rule requiring a final response, indication, or alert for a drug dog to be sufficiently reliable."); *see Parada*, 577 F.3d 1275; United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013).

132 *Braddy*, 11 F.4th at 1314; s*ee Harris*, 568 U.S. at 244.

133 *Braddy*, 11 F.4th at 1315 n.2 (Rosenbaum, J., concurring in part and dissenting in part) (noting that such evidence would be insufficient for the purposes of reasonable suspicion, and therefore insufficient for probable cause, since probable cause is a higher standard than reasonable suspicion); *see* United States v. Rivas, 157 F.3d 364 (5th Cir. 1998).

134 *Braddy*, 11 F.4th at 1315 n.1 (Rosenbaum, J., concurring in part and dissenting in part) ("I concur in the majority's holding that the initial decision to stop Braddy was lawful and that Officer Sullivan did not unlawfully prolong the traffic stop.").

135 *Id.* at 1315 ("Here, the officer's descriptions of his observations did not include the kind of objective and articulable facts that are necessary to support a finding of probable cause. Probable cause is an objective standard.").

136 *Id.* ("But Officer Sullivan's observations of the drug dogs' behavior are closer to the kind of 'inarticulate hunches' that the Fourth Amendment forbids." (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968))); *see Terry*, 392 U.S. 1; United States v. Gonzalez, 969 F.2d 999 (11th Cir. 1992).

the dissent thought that the video evidence did not confirm the testimony of the officers.[137]

Additionally, the dissent explained that a final alert may not be required to provide probable cause as long as the dog indicates with enough objectivity in its behavior.[138] On this point, the dissent agreed with the majority regarding the lack of a final alert.[139] That is, as the majority stated, a final alert requirement would be the kind of rule not permitted under a flexible approach.[140] However, the dissent added that a finding of the required objectivity depends on the particular circumstances of the case.[141]

According to the dissent, such objective factors were not present in the testimony of the officers and were not demonstrated by the video of the stop.[142] Because of the reliance on subjective interpretations, and the insufficient presence of objective determinations from the officers for probable cause, the dissent would have reversed the district court's decision to deny the motion to suppress.[143]

IV. ANALYSIS

A. *Totality of the Circumstances, Strict Evidentiary Checklists, Objectivity, and Subjectivity*

The majority is correct in its overall analysis of the requirements of probable cause and how it can be provided by drug detection dogs.[144] The majority accurately states that a drug detection dog can provide probable cause under Supreme Court and Eleventh Circuit precedent.[145]

---

137 *Braddy*, 11 F.4th at 1316 (Rosenbaum, J., concurring in part and dissenting in part) ("True, the district court concluded that the dash-cam video here confirmed the officers' testimony. Perhaps it did, but most respectfully, despite multiple attempts, I can't see it. The dogs moved around the vehicle with such pace that it would be hard to isolate any specific behavior.").

138 *Id.* at 1317 ("I do not disagree with these decisions. An indication by a dog that is something less than a final alert but is nonetheless objectively definitive may be sufficient to provide probable cause.").

139 *Id.*

140 *Id.* at 1314–15 (majority opinion).

141 *Id.* at 1317 (Rosenbaum, J., concurring in part and dissenting in part).

142 *Id.* ("Here, to justify their search of Braddy's vehicle, the officers relied on their subjective interpretations of ambiguous and general behavior that occurred within a 'split second' and that, at least to my review, do not appear to be captured in video footage of the supposed alert behavior.").

143 *Id.*

144 *Id.* at 1312 (majority opinion).

145 *Id.*; *see* Florida v. Harris, 568 U.S. 237 (2013); United States v. Banks, 3 F.3d 399 (11th Cir. 1993).

Furthermore, the majority is right to point to Supreme Court precedent on the requirements sufficient for probable cause in this area of law.[146]

The cases the majority cites indicate that a strict evidentiary checklist is inappropriate,[147] that courts should look to the totality of the circumstances,[148] and that courts should consider whether the facts would make a reasonably prudent person think that a search would reveal evidence of a crime.[149] At this point, nothing the majority has referenced is incorrect, though its analysis has mainly been in the abstract.[150] However, the majority struggles in its attempt to persuasively argue that these drug detection dogs did, in fact, provide alerts that were sufficiently reliable for probable cause.[151]

The majority falters in its application of Supreme Court precedent, and arguments from other circuit courts, to this case.[152] Though it is correct that it should reject an approach that uses a strict evidentiary checklist,[153] the majority takes an overly broad view of what constitutes such a checklist.[154] To the majority, what is permissible includes only the most flexible of processes, while, in effect, excluding requirements necessary for ensuring objectivity.[155]

The majority focuses only on what is prohibited under a rigid standard and makes no attempt to explore potential permissible processes that look to objectivity.[156] That is, it does not consider the idea that a court could maintain some objective standard without that standard necessarily being a rigid one.[157] Though courts should not use a strict checklist, avoiding the use of rigid standards does not necessarily imply that courts should exclude any and all possible objective standards.[158] However, the word "objective" is not used once throughout the entire

146 *Braddy*, 11 F.4th at 1310–12.

147 *Id.* at 1312; *see Harris*, 568 U.S. at 244.

148 *Braddy*, 11 F.4th at 1312; *see Harris*, 568 U.S. at 244.

149 *Braddy*, 11 F.4th at 1312; s*ee Harris*, 568 U.S. at 248.

150 *Braddy*, 11 F.4th at 1310–12.

151 *Id.* at 1311–12.

152 *See generally id.* at 1312–15.

153 *Id.* at 1312; *see Harris*, 568 U.S. at 244.

154 *Braddy*, 11 F.4th at 1314.

155 *Id.* (focusing on the potential requirement of a final alert, without examining the need for further objective evidence).

156 *Id.*

157 *Id.* ("We decline to adopt this rigid standard as there is no 'strict evidentiary checklist' for assessing whether a drug detection dog is sufficiently reliable." (quoting *Harris*, 568 U.S. at 245)); *see Harris*, 568 U.S. at 243–44.

158 *See infra* Part V.

section of the majority's opinion on probable cause and drug detection dog alerts.[159]

B. *Final and Unfinished Alerts*

Based on its misunderstanding of what is required for probable cause in this case, the majority further misreads cases from other circuits.[160] It correctly notes that an official and final alert is not necessarily required to establish probable cause,[161] but it takes this finding a step too far. The majority incorrectly assumes that, because a final alert is not required, any kind of unfinished signal may be sufficient for establishing probable cause.[162] The cases it cites from the Ninth and Tenth Circuits involve situations where probable cause was established despite the use of an unfinished dog alert.[163] However, the majority completely ignores the crucial details of those cases, which describe evidence that is much more objective than the evidence in this case.[164]

The majority uses the lack of a final indication in *United States v. Parada* as support for its version of a fluid concept of probable cause, but does not delve into the actual facts of the case.[165] In *Parada*, the dog had some similar behaviors as the dogs in *Braddy*, in that both exhibited changes in posture and breathing.[166] However, the majority declines to mention that the dog in *Parada* showed clear differences from the dogs in *Braddy*, as the dog in *Parada* attempted to jump into the car through the window and would have succeeded had the officer not prevented the dog from doing so.[167] A similar dynamic is at play in *United States v. Thomas*, which the majority also cites approvingly but fails to describe

159 *Braddy*, 11 F.4th at 1312–15.

160 *See id.*

161 *Id.* at 1314.

162 *Id.* at 1314–15 (requiring only that the dog be certified by a bona fide organization, subject to conflicting evidence).

163 *See* United States v. Parada, 577 F.3d 1275 (10th Cir. 2009); United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013).

164 *Braddy*, 11 F.4th at 1314; s*ee Parada*, 577 F.3d 1275; *Thomas*, 726 F.3d 1086.

165 *Braddy*, 11 F.4th at 1314 ("Indeed, other circuits have similarly rejected a stricter rule requiring a final response, indication, or alert for a drug dog to be sufficiently reliable.").

166 *Id.*; *Parada*, 577 F.3d at 1279 ("Officer Oehm testified that the dog's body stiffened and his breathing became deeper and more rapid, signaling that he had discovered an odor he was trained to detect.").

167 *Parada*, 577 F.3d at 1279 ("According to Officer Oehm, Rico tried to jump in the window, but Oehm pulled him off before he succeeded.").

how excited the dog was, as well as the dog's clear physical actions in jumping and pawing at the car.[168]

The majority uses these cases to support a flexible method for assessing probable cause, but they actually work against the majority's holding in *Braddy*. Both cases demonstrate dog behavior that is clearly more objective than the behavior of the dogs in *Braddy*.[169] In *Braddy*, the closest that the dogs, Leroy and Chico, got to this kind of behavior was when one dog apparently began to lift its paw but was interrupted by Lieutenant Cully.[170]

A key distinction here is that a partially lifted paw without additional context is hardly useful, and one cannot assume what would have happened had the paw lift not been interrupted. That is especially true when such an assumption would then be used to provide the basis for a finding of probable cause.[171] It is simply not a credible argument for the majority to compare a dog's minor reactions like breathing and posture changes to a dog placing its paws against a car, or even trying to jump into a car.[172]

C. *Law and Fact*

The majority also fails in its argument on the factfinder's choice of whom to believe regarding whether an alert occurred.[173] The factfinder accepting the details from the officers would still be insufficient for probable cause because those details, accepted as true, do not provide a sufficient basis for probable cause.[174] For the issue of the sufficiency of weak dog alerts, the critical dispute is not one of fact but one of law.[175] Under the precedent of this circuit court, for appeals of denials of motions

168 *Braddy*, 11 F.4th at 1314; *Thomas*, 726 F.3d at 1088 ("The dog was 'in odor' throughout, meaning he was very animated and excited. Near the gas tank on the passenger side the dog exhibited more alert behavior. . . . Beny-A jumped up and placed his paws on the vehicle and pressed his nose against [the defendant's] toolbox.").

169 *Braddy*, 11 F.4th at 1314; *see Parada*, 577 F.3d 1275; *Thomas*, 726 F.3d 1086.

170 *Braddy*, 11 F.4th at 1305 (describing how the dog "began lifting his paw up before Lieutenant Cully tripped over the dog").

171 *See* United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993).

172 *See Braddy*, 11 F.4th at 1314 (arguing that these circuit court cases support its holding regarding final alerts).

173 *Id.* at 1313–14.

174 *See supra* Section IV.A.

175 *Id.*

to suppress evidence, courts review the findings of fact for clear error but review the applicable law from a fresh perspective.[176]

The majority seeks to bolster its argument on the sufficiency of the drug detection alerts in this case by pointing to the training and certification of the dogs and officers.[177] However, the majority loses sight of the key issue—that being the legal consequences of the interpretations of the dogs by the officers, and not the qualifications of the dogs themselves.[178] Here, the majority would be correct in its argument on the review of findings of fact for clear error if the dispute had been over the existence of particular facts, such as whether or not the dog had tried to jump into the car, but that is not the situation in this case.[179]

The majority distorts this question, finding the issue of what constitutes an alert to be one of fact, when such a problem is a legal one to be considered for its sufficiency in a probable cause context.[180] One could accept as true the entirety of the officers' testimony regarding their descriptions of the dogs' specific behaviors. However, such descriptions do not inherently qualify as alert behavior, and therefore would not change the probable cause analysis. The inadequacy of such descriptions was discussed with *United States v. Rivas*, the Fifth Circuit case cited by the dissent, in which a dog that was similarly distracted and temporarily stopped did not provide probable cause.[181]

Accepting the officers' description, despite the lack of clear corroboration from the dash-cam video, still only yields a kind of behavior insufficient for a probable cause alert.[182] Indeed, an undisputed description of the behavior of the dogs can be characterized as not that different from the regular behavior of a typical dog.[183] Thus, the majority

---

176 United States v. Luna-Encinas, 603 F.3d 876, 880 (11th Cir. 2010) ("In an appeal of the district court's denial of a defendant's motion to suppress, we review the district court's findings of fact for clear error and its application of the law to those facts *de novo*.").

177 *Braddy*, 11 F.4th at 1312 ("We hold that the officers' two drug detection dogs were sufficiently reliable to provide probable cause for the officers to search Braddy's vehicle. Both Officer Sullivan and Lieutenant Cully testified in detail about the training and certifications that they and their drug detection dogs obtained."); *see* Florida v. Harris, 568 U.S. 237, 246 (2013).

178 *Braddy*, 11 F.4th at 1312.

179 *Id.* at 1313–14 ("[O]ur review of the district court's factual findings, including its credibility determinations, as to whether the dogs alerted is for clear error . . . .").

180 *Id.*

181 United States v. Rivas, 157 F.3d 364, 368 (5th Cir. 1998); *see supra* Section I.C.3.

182 *Braddy*, 11 F.4th at 1313–14 (describing how the lack of video confirmation is not dispositive).

183 *Id.* at 1315–16 (Rosenbaum, J., concurring in part and dissenting in part) ("The behavior [Officer Sullivan] describes—a slight change in posture or breathing, particularly one that is said to happen within a fraction of a second—is described at such a high-level of generality, it could easily refer to normal dog behavior.").

was "barking up the wrong tree" in its incorrect analysis of the proper standard of review.[184]

D. *Practical Effects*

A key factor to consider regarding drug detection dog alerts should be the effects of these procedures in practice. If a sufficient alert can be found based solely on the officer's subjective interpretation, then not very much is required of the dogs, and they can be brought along as a mere pretext for probable cause.[185] An officer could claim to have observed subtle behavior that only the officer is capable of truly recognizing as an alert, and then use that conclusion to find probable cause.[186]

It may be true that some officers, given their experience and history with specific trained dogs, do indeed detect some otherwise unassuming behavior. Indeed, that may have been the case in *Braddy*, where the search ultimately yielded a large drug bust.[187] However, this kind of results-oriented thinking can serve to erode the protections of the Fourth Amendment, especially when the focus is mainly on successful searches, while disregarding the searches that are not as fruitful.

Given the statistics on success and error rates by drug detection dogs, even those that are certified, trained, and reaching final alerts, one should consider the negative implications of expanding what is considered sufficient for probable cause.[188] In Justice Souter's dissent in *Illinois v. Caballes*, he wrote that "[t]he infallible dog, however, is a creature of legal fiction,"[189] and explained that the impressive accuracy of these dogs is a myth disseminated by courts that fail to consider the potential limitations and errors at play in statistical analysis.[190]

---

184 *See id.* at 1313–14 (majority opinion).

185 Weiner & Homan, *supra* note 59, at 13 ("When the handler testifies that the dog alerted in something other than the manner in which it was trained to respond to the presence of drugs, there is cause to question whether the dog actually did alert . . . .").

186 *See supra* note 1 and accompanying text.

187 *Braddy*, 11 F.4th at 1307 ("During the stop, Officer Sullivan and other officers developed information that resulted in the search of the vehicle, where they discovered approximately sixty-two kilograms of cocaine and a bag containing approximately $40,000 in cash.").

188 Katz & Golembiewski, *supra* note 52, at 757 ("Existing case law demonstrates that the false-alert rate among certified drug dogs varies greatly. Further, the assertion in *Place* that drug dogs are highly accurate was not supported by any authority or empirical studies; Justice O'Connor's majority opinion simply stated the conclusion as an established fact.").

189 Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting).

190 *Id.* at 411–12 ("[T]heir supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by

This "legal fiction"[191] can be further explored by analyzing what exactly the success rate of a drug detection dog means. For example, a court may look into a dog's training and see that it has a ninety-five percent accuracy rate and, in turn, believe that there is a ninety-five percent chance that a dog alert–provided search yields drugs.[192] Based on that assumption, a court may believe that if this dog sniffs and alerts 100,000 times, then 95,000 of the subsequent searches will result in the finding of drugs.[193] However, this accuracy rate actually means that this dog is alerting ninety-five percent of the time that drugs are present.[194]

Accordingly, the percentage of subsequent searches that do yield drugs is far below the assumed ninety-five percent.[195] The true odds of a successful search require taking into account false positive rates, false negative rates, and the overall likelihood that a car being sniffed by a drug detection dog has drugs in it.[196] Applying Bayes' Theorem with the ninety-five percent accuracy rate, and assuming a five percent false positive rate and that five percent of cars stopped to be sniffed by dogs contain drugs, the overall detection rate would drop down to fifty percent.[197]

---

their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine.").

191 *Id.* at 411.

192 Matthew Slaughter, *Supreme Court's Treatment of Drug Detection Dogs Doesn't Pass the Sniff Test*, 19 NEW CRIM. L. REV. 279, 295 (2016) ("[T]he accuracy rates of detection dogs are a misconception of reliability. Courts are under the assumption that a 95 percent accuracy rate equates to a 95 percent success rate in uncovering contraband. Bayes' Theorem exposes the myth of these accuracy rates as a necessary indicator of reliability." (footnotes omitted)). The scientific community uses Bayes' Theorem "to evaluate conditional probabilities." *Id.* at 295 n.142.

193 *See id.* at 295.

194 Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 12–15 (2006) ("Applying Bayes' Theorem debunks the common fallacy that an alert by a dog with a ninety percent success rate means there is a ninety percent chance that this particular vehicle contains the controlled substance. In fact, that conclusion could not be further from the truth." (footnote omitted)).

195 *See id.*

196 Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 426–28 (1997) ("Information tallying the number of successes alone, although somewhat probative, leaves numerous questions unanswered. For example, the number of successes alone does not reveal the amount of narcotics the dog may have missed.").

197 Taylor Phipps, *Probable Cause on a Leash*, 23 B.U. PUB. INT. L.J. 57, 67–68 (2014) (applying Bayes' Theorem, first to a random population, and then to a population more likely to be carrying drugs). The hypothetical numbers used in this Case Note are a 95% accuracy rate, a 5% false positivity rate, a 5% false negativity rate, and a 5% underlying probability of stopped cars containing drugs. With these numbers, if there are 100,000 stopped cars, 5,000 would contain drugs and 95,000 would not. The dog would alert to 4,750 (95% of 5,000) of the drug-carrying cars, but also 4,750 (5% of 95,000) of the non-drug-carrying cars. Thus, only 50% (4,750/(4,750 + 4,750)) of the cars

A more objective standard for analyzing drug detection dogs for the purposes of establishing probable cause could help improve these rates. However, validating the subjective approach used in *Braddy* may maintain or worsen these rates as courts expand the universe of dog behaviors that can provide probable cause.[198] With the *Braddy* approach, courts would be taking the errors from dogs and potentially combining them with errors from police officers interpreting their dogs.[199]

V. PROPOSAL: AN OBJECTIVE STANDARD

A drug detection dog alert should be considered sufficient for establishing probable cause based on the reliability of the dog's abilities, and not based on the officers' beliefs in their own abilities to interpret the ambiguous behavior of dogs.[200] As counsel for the appellant, Braddy, argued at the Eleventh Circuit, "we severely undercut the whole reason we rely on these dogs if we allow the alert to be interpreted by an officer in such a way."[201]

The proper way for courts to evaluate drug detection dog alerts for sufficient reliability, when those alerts have not reached their final stage, is to use the context-based, totality of circumstances analysis prescribed by case precedent,[202] while maintaining a view of what is reasonably considered objective evidence. An avoidance of rigid standards, the kind frowned upon by case precedent,[203] does not, in turn, require a dependence on subjective interpretations. The dissent is correct that, although a final alert is not mandatory, a greater level of objectivity is required for probable cause.[204] Without such objectivity, the dissent

---

the dog is alerting to would actually contain drugs. *See id.* (explaining Bayes' Theorem in this context in further detail).

198 *See* United States v. Braddy, 11 F.4th 1298, 1315 (11th Cir. 2021).

199 *See id.*; Bird, *supra* note 196, at 426–28; Phipps, *supra* note 197, at 67–68.

200 Weiner & Homan, *supra* note 59, at 13 ("[The courts' approach] largely, if not entirely, ignores the role of the dog's handler . . . . [A]nd relatedly, it assumes that an 'alert' is an alert because the handler said it was. Most courts have failed to consider—or even recognize—the role of the dog's handler in the process.").

201 Oral Argument at 37:19, *Braddy*, 11 F.4th 1298 (No. 19-12823), http://www.ca11.uscourts.gov/content/19-12823 [https://perma.cc/G94F-NZLR].

202 *See* Florida v. Harris, 568 U.S. 237 (2013); United States v. Gonzalez, 969 F.2d 999 (11th Cir. 1992).

203 *See Harris*, 568 U.S. 237; United States v. Banks, 3 F.3d 399 (11th Cir. 1993).

204 *Braddy*, 11 F.4th at 1316 (Rosenbaum, J., concurring in part and dissenting in part) ("[P]lacing our blind faith in the officers' subjective interpretations of common dog behavior . . . would effectively insulate law enforcement from judicial scrutiny. Without objective evidence, we cannot assess the reasonableness of a given search or seizure.").

shows that it would be very difficult, if not impossible, to accurately scrutinize and review the actions of officers in the courts.[205]

One potential objection to this proposal may focus on the consideration of objectivity from a reasonable person's view, as prescribed by the Fourth Amendment,[206] rather than the view of an experienced police officer. Indeed, the majority makes the point that the police officers in *Braddy* were familiar with how their dogs typically reacted to the presence of drugs,[207] and that such familiarity bolsters the reliability of the dogs when analyzing their alerts.[208] This Case Note does not dispute the idea that police officers who train with drug detection dogs are potentially capable of perceiving certain reactions by their dogs that may otherwise appear insignificant to a layperson. However, as discussed earlier, allowing such observations to be used as the basis for establishing probable cause could effectively eliminate meaningful reviewability of the officers' actions.[209]

For that reason, probable cause requires more than the observation of simple, minor behaviors in drug detection dogs that could be observed just as easily in household dogs.[210] Examples of objective behavior sufficient for a proper probable cause–establishing alert can be found in the very cases that the majority cites for support.[211] As previously described, the dogs in *Parada* and *Thomas* exhibited behaviors that were much more objectively discernable as an indication of drugs than the dogs' behaviors in *Braddy*.[212] That is to say, a dog attempting to jump into a car,[213] or otherwise displaying clear physical interactions with a car,[214] could be considered sufficient objective behavior. Similar qualifying

---

205 *Id.*

206 *See Harris*, 568 U.S. at 243.

207 *Braddy*, 11 F.4th at 1313.

208 *Id.* at 1314 ("Here, the district court explained that 'the officers were in better position to observe and judge the actions of their canines both because they were in close proximity at the scene and because of their history of extensive training and familiarity with their canines.'").

209 *Id.* at 1316 (Rosenbaum, J., concurring in part and dissenting in part) ("Absent meaningful judicial review, law-enforcement officers could use their subjective beliefs as a license to invade the privacy of the citizenry at will."); *see* John J. Ensminger & L.E. Papet, *Walking Search Warrants: Canine Forensics and Police Culture after* Florida v. Harris, 10 J. ANIMAL & NAT. RES. L. 1, 1 (2014) (describing the use of a drug detection dog by a police officer as a "walking search warrant").

210 *Braddy*, 11 F.4th at 1316 (Rosenbaum, J., concurring in part and dissenting in part) (discussing how the behaviors by the dogs in *Braddy* are not particularly meaningful because "the same behavior occurs routinely in dogs who are not drug-sniffing canines").

211 *Id.* at 1314 (majority opinion); *see* United States v. Parada, 577 F.3d 1275 (10th Cir. 2009); United States v. Thomas, 726 F.3d 1086 (9th Cir. 2013).

212 *See supra* Section IV.B.

213 *See Parada*, 577 F.3d at 1279.

214 *See Thomas*, 726 F.3d at 1087–88.

behavior is also demonstrated by *United States v. Moore* and *United States v. Seals*, in which drug detection dogs jumped on or through the drivers' side windows.[215]

Such objectivity is needed in order to conform to the applicable precedent, which demands that the facts be objectively considered from the perspective of a reasonable person.[216] This does not necessarily require that a dog complete its trained alert pattern, and indeed a final alert was not present in *Parada* or *Thomas*.[217] But the absence of a final alert leaves a probable cause gap requiring supplementation by other objective evidence. An objectively reasonable police officer relying on such objective observations for probable cause would then be properly in line with precedent from the Supreme Court.[218]

CONCLUSION

The majority erred in finding that the subjective interpretation of drug detection dogs by officers was sufficient for establishing probable cause.[219] The dissent, and other courts, are correct that a showing of objective evidence is required for probable cause, otherwise probable cause becomes a much weaker standard.[220]

Braddy presents a clear opportunity, given its split with other courts, to develop an objective standard for the treatment of unfinished or weak drug detection dog alerts.[221] This proposed standard is a fairly modest one, relatively speaking, given the other proposals on this topic that have gone much further in expressing strong concerns about the current legal scheme for drug detection dog use.[222] Some papers have argued for

---

215 *See* United States v. Moore, 795 F.3d 1224, 1227 (10th Cir. 2015); United States v. Seals, 987 F.2d 1102, 1105 (5th Cir. 1993).

216 *See* Florida v. Harris, 568 U.S. 237, 243 (2013).

217 *See Parada*, 577 F.3d 1275; *Thomas*, 726 F.3d 1086.

218 *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

219 United States v. Braddy, 11 F.4th 1298, 1315 (11th Cir. 2021).

220 *Id.* at 1315–17 (Rosenbaum, J., concurring in part and dissenting in part); *see* United States v. Rivas, 157 F.3d 364 (5th Cir. 1998); United States v. Heir, 107 F. Supp. 2d 1088 (D. Neb. 2000); United States v. Wilson, 995 F. Supp. 2d 455 (W.D.N.C. 2014).

221 *See Rivas*, 157 F.3d 364 (providing an example of the Fifth Circuit's application of an objective standard).

222 *See, e.g.*, Megan Yentes, Note & Comment, *Supply the Hand That Feeds: Narcotic Detection Dogs and the Fourth Amendment*, 37 N. ILL. U. L. REV. 461, 462 (2017) ("[U]se of these drug-detecting canines during searches of automobiles has unleashed doubts as to whether private citizens' Fourth Amendment protections have been violated. These doubts arise from varying rates of accuracy in canine performance, as well as a lack of certification standards employed by the states and federal government."); Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108

revisiting the *Place* doctrine itself,[223] or even for its reversal,[224] and have called for greatly reducing the ability of drug detection dogs to serve as suppliers of probable cause.[225]

Though a final alert is not necessary, establishing probable cause using a drug detection dog must include sufficient objective evidence based on the behavior of the dog.[226] Examples of such objective evidence can be found in cases cited by the majority, including *Parada* and *Thomas*, with a drug detection dog pawing at a car, pressing its face to the area of interest, or trying to jump into the car.[227] Such examples would meet the requisite level of objectivity because they provide facts that would reasonably lead someone to believe that evidence of a crime is present.[228]

Absent a completed alert pattern, the behavior of the dog must still rise to an objective level higher than the "split-second" minor breathing and posture changes shown by the dogs in *Braddy*.[229] The argument from the Eleventh Circuit may be that courts should simply "let sleeping dogs lie," but an objective contextual analysis must be used in order to maintain the protections of the Fourth Amendment.[230]

NW. U. L. REV. COLLOQUY 64, 79 (2013) ("Contrary to the sentiments expressed in the popular song, then, the dog days are far from over, and *Harris* and *Jardines* have not yet put the Fourth Amendment issues surrounding drug-detection dogs to bed." (footnote omitted)).

223 *See, e.g.*, Slaughter, *supra* note 192, at 308–09 ("The current Supreme Court approach to the nuances involved in drug detection dogs is fundamentally flawed. The Supreme Court has allowed, on the evidentiary front, the introduction of unscientific evidence into law enforcement practices, which allows officers to disregard traditional Fourth Amendment protections.").

224 *See, e.g.*, Katz & Golembiewski, *supra* note 52, at 739 ("This Article concludes by suggesting that the *Place* analysis was based upon a foundation of sand, and not only should *Place* not be extended, it should be overturned, thereby allowing traditional Fourth Amendment standards to control the use of drug dogs.").

225 *See, e.g.*, Jacey Lara Gottlieb, *Who Let the Dogs Out—And While We're at It, Who Said They Could Sniff Me?: How the Unregulated Street Sniff Threatens Pedestrians' Privacy Rights*, 82 BROOK. L. REV. 1377, 1422–23 (2017) ("As the Court has indicated, a government interest in safety cannot be achieved through means that utterly violate an individual's expectation of privacy. The current regime, however, persists in doing just that—by permitting sniffs to circumvent established laws." (footnote omitted)); Phipps, *supra* note 197, at 83 ("Currently, deficiencies in certification and training programs lead to unacceptable amounts of false positives and undermine the assumption that dogs are infallible indicators of probable cause. Numerous studies have been written on the issue and all point to the same conclusion: dogs are not reliable indicators of probable cause.").

226 *See supra* Part V.

227 *See* United States v. Parada, 577 F.3d 1275, 1279 (10th Cir. 2009); United States v. Thomas, 726 F.3d 1086, 1087–88 (9th Cir. 2013).

228 *See supra* Section I.A.

229 United States v. Braddy, 11 F.4th 1298, 1304–06 (11th Cir. 2021).

230 *See supra* Section I.B.